

JUNE 2007

NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

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Events

Biennial Criminal Law Section Policy Conference Parole Reform June 15-17, 2007 Grand Hotel, Mackinac Island

Parole Reform: Is it time? What is the best policy for Michigan? State policy on the granting and management of parole is critical to your case at sentencing. The availability of constructive alternatives to prison is an important consideration. Parole realities impact the administration of incarceration. Should the availability and quality of post-prison services influence parole policy? How about the availability of prison space, and state budget problems? We know that when a parolee fails to manage freedom, the outcome rains on the goal of letting the right offenders out early. What policies are right for our state in these difficult economic times? How are other states managing parole?

Criminal Law Section conference attendees, with the assistance of a distinguished panel of professionals, will address these questions at our classic every-other-year policy conference. Registrants will receive a complimentary copy of Judge Kolenda's newly-revised book entitled "Potentially Dispositive Pre-Trial Motions." Please join us for this exciting event!

More detailed information on the conference is provided on the following page of this newsletter. Pre-registration materials are also enclosed in this newsletter as an insert.

State Bar of Michigan Annual Meeting September 26-28, 2007 Amway Grand Plaza Hotel, Grand Rapids

Save the date! More information, including section activities during the annual meeting, will be published in future newsletters.

Council Meeting

The monthly council meetings are suspended through the summer months. The meetings will resume in the fall. Specific meeting dates will be published in future newsletters.

Biennial Conference Details

Many now believe that Michigan is spending money we no longer have, to house prisoners that do not need to be in costly secure facilities. Balancing incapacitation, deterrence and public safety, with the objective of turning offender lives around, and using public funds wisely to that end, may require greater use of parole. As this is being written, a “complete overhaul” of parole guidelines is being prepared by the Department of Corrections. Our conference participants will examine these issues, and consider a Criminal Law Section policy statement to guide our future advocacy, with the assistance of the following resource persons:

Ronald Bretz, Professor of Law, Thomas M. Cooley Law School; President, Board of Directors, Citizen’s Alliance on Prisons and Public Spending.

Honorable Paul Condino, Chair, House of Representatives Committee on the Judiciary.

Honorable Alan Cropsey, State Senator; Chair, Appropriations Sub-Committee on Corrections.

Gary Gabry, Defense Attorney; Former Chair, Michigan Parole Board; Former Prosecuting Attorney, Ionia County; Former Chair, State Bar Criminal Law Section; Moderator.

Jorge Montes, Chair, Prisoner Review Board, Illinois.

John Rubitschun, Deputy Director, Michigan Department of Corrections; Former Chair, Michigan Parole Board.

Kathleen Schaefer, Private Consultant, Parole & Probation.

Kimberly Thomas, Clinical Assistant Professor of Law, University of Michigan Law School.

The conference agenda is as follows:

Friday, June 15, 2007

4:00 P.M.: Registration

9:00 P.M.: Welcoming Hospitality

Saturday, June 16, 2007

9:00 A.M. – 1:00 P.M.: Primary Session

4:00 P.M.: Optional Session

6:00 P.M.: Grand Hotel Reception

Sunday, June 17

9:00 A.M.: Honorable Dennis Kolenda, 17th Circuit Court Judge*

10:00 A.M.: Closing Conference Session

Return the enclosed Grand Hotel form to pre-register for the conference. For alternate accommodations on the island, check www.mackinac.com. Criminal Law Section registration fee of \$50.00, payable at the door, covers a registering section member and spouse or non-section member guest for all conference events including receptions. Display this newsletter to **Arnold Transit** for discounted ferry service from Mackinac City or St. Ignace. The \$16.00 fee includes free parking and free valet service. (The public pays \$21.00).

With questions about the conference, call Charles Marr at 248-596-1599. With questions about the hotel, call Jim Shonkwiler at 517-927-6103.

* Includes complimentary distribution of *Potentially Dispositive Pre-Trial Motions* (2007 Revised Edition)

Recent State & Federal Criminal Cases

US v Kosinski, No. 05-2664 (March 22, 2007): Defendant was convicted of conspiring to defraud the Internal Revenue Service and to structure currency transactions to evade agency reporting requirements, submitting false federal income tax returns, and structuring a currency transaction to evade agency reporting requirements. He was sentenced to three years under probation supervision, with the condition that the first six months be served in a halfway house and that the second six months be served on home confinement. The government appealed. The Sixth Circuit Court of Appeals vacated the sentence, finding that the district court failed to recognize its discretion to calculate and consider the defendant's tax loss in sentencing him. The district court erroneously believed that the guidelines were mandatory, and that it did not have authority to depart from them. The reviewing court held that a district court can enhance a sentence based on factors not proven to a jury or admitted by the defendant without violating *Booker* if it considers the guidelines to be advisory and not mandatory, and if the information is reliable and supported by a preponderance of evidence.

People v Uphaus, No. 267238 (April 3, 2007): Defendant was convicted of one count of delivery of marijuana, one count of possession of marijuana with the intent to deliver, and four counts of carrying or possessing a firearm during the commission of a felony. The trial court sentenced him to concurrent terms of four to eight years in prison for each marijuana conviction. It also vacated three felony-firearm convictions and, for the remaining felony-firearm conviction, sentenced the defendant to serve two years in prison consecutive to and preceding the marijuana convictions. The Michigan Court of Appeals affirmed the convictions, but vacated the sentences due to the trial court's reliance on facts not proven to a jury beyond a reasonable doubt to depart from the guidelines' intermediate sanction cell. The trial court departed based on its conclusion that the defendant was a serious threat to society and, in particular, to the police officers in the case. The reviewing court noted that, when it applies, the statute providing for intermediate sanction cells is mandatory and the trial court cannot use judicial findings to support an upward departure from the limitations imposed by the statute without violating the defendant's constitutional rights. The trial court could only impose a prison term if it stated a substantial and compelling reason that was based on facts proven to a jury beyond a reasonable doubt or based on prior convictions. The Court of Appeals further held that the trial court did not err when it vacated three of the felony-firearm convictions. It concluded that the appropriate "unit of prosecution" is the felonious conduct rather than the number of firearms carried or possessed.

US v Franco, No. 99-2194 (April 11, 2007): Defendant was convicted of possession with intent to distribute cocaine following a jury trial, and was sentenced to more than eleven years in prison (136 months). Defendant, a fifty-year-old first-time offender, was assigned a criminal history category and total offense category which resulted in a guidelines sentence range of 121 to 151 months. On appeal he argued, inter alia, that the district court may have sentenced him to a below-guidelines sentence if it had such discretion at the time rather than sentencing him to the midpoint of the range. Because he was sentenced pre-*Booker*, the district court had no discretion to sentence the defendant outside the applicable guidelines range. The Sixth Circuit Court of Appeals affirmed the convictions, but remanded for re-sentencing, finding that the defendant was entitled to re-sentencing under *Booker* because his direct appeal was pending when the case was decided.

US v Cohen, No. 06-5594 (April 13, 2007): Defendant was charged with felon in possession of ammunition and felon in possession of a firearm, based on items that were found in a search of his car. The district court suppressed the evidence, finding that officers did not have reasonable suspicion to stop the car. The government appealed. The Sixth Circuit Court of Appeals affirmed, finding that the totality of the circumstances did not provide reasonable suspicion for the police to make an investigatory stop. The totality of the circumstances consisted of the following limited facts: In the early morning hours, two officers were dispatched to a residence in response to a silent 911 hang-up call; the residence was on a cul-de-sac of five or six houses running off a dead-end street; one officer saw a car make a right turn from the cul-de-sac onto the dead-end street four minutes after being dispatched. Knowing no other facts relevant to whether he could lawfully make an investigatory stop, the officer stopped the car. The reviewing court found that the hang-up call, without follow-up calls by a dispatcher or other information, was analogous to an anonymous tip. It did not provide a description of the defendant or his car and, thus, did not identify any determinate person. The complete lack of information conveyed by the call, and the total absence of corroborating evidence indicating that criminal activity was afoot, required the court to give the call little weight in evaluating the totality of the circumstances.

Court Rules Impacting Criminal Cases

Proposed Amendment of Rule 7.306 of the Michigan Court Rules:

The proposed amendments would alter the requirements for filing amicus curiae briefs with the Michigan Supreme Court. Proposal A would add a provision similar to United States Supreme Court Rule 37.4 to allow state agencies, and attorneys operating on behalf of public agencies, to submit an amicus curiae brief without filing a motion to seek permission to file one. Proposal B includes the same proposed change and, in addition, would allow an amicus curiae twenty-eight days after the filing of the appellee's brief to file its amicus curiae brief unless the directed otherwise. This provision would replace the current rule requiring amicus curiae to file a brief within the same time period in which the party it supports must file its brief. The comment period for the proposed amendment expires on June 1, 2007.

Amendment of Rule 3.904, and 5.738a of the Michigan Court Rules:

Rule 3.904 allows courts to use interactive video technology during specified delinquency and child protective proceedings, if the court does not order more restrictive placement or treatment.

Rule 5.738a allows courts to use interactive video technology to conduct hearings concerning initial involuntary treatment, continuing mental health treatment, and petitions for guardianship involving persons receiving treatment in mental health facilities. Effective May 1, 2007.

Amendment of Rules 6.001, 6.610, and 6.625 of the Michigan Court Rules:

The amendment of Rule 6.001 makes subrules 6.005(B) and (C) applicable to misdemeanor cases. Those subrules set forth the factors to be used by the court to determine whether a criminal defendant is indigent and, to allow the court to require the defendant to contribute to the cost of providing a lawyer and establishing a plan for collecting the fee, if the defendant is able to pay part of the cost of a lawyer.

The amendment of Rule 6.610 ensures that indigent defendants who are convicted in district court and sentenced to incarceration are aware of their right to counsel. The amendment requires that after a sentence of incarceration is imposed, the court must advise the defendant that if the s/he wants to file an appeal and is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal if the request for a lawyer is made within fourteen days of sentencing. The court must so advise the defendant even if the sentence of incarceration is suspended.

The amendment of Rule 6.625 requires the court to enter an order appointing an attorney to represent an indigent defendant on appeal from a conviction in district court if the court imposes a sentence of incarceration, even if suspended, and the defendant requests an attorney within fourteen days of sentencing. If there is a post-judgment motion pending, the court must rule on the request for counsel within fourteen days after the disposition of the motion. If a lawyer is appointed, the twenty-one days for taking an appeal shall commence on the day of appointment.

The above amendments took effect on May 1, 2007.